Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

No. 80-613

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SHOSHONE and ARAPAHOE TRIBES,
Petitioners

v.

DRY CREEK LODGE, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE SHOSHONE AND ARAPAHOE TRIBES

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November 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondents' sole argument in opposition to the petition filed by the Tribes is that Article I of the Treaty of July 3, 1868—which requires the Indians to turn over "bad men" to the United States—constitutes a waiver of tribal immunity from suit (Op. pp. 7-10; Treaty of July 3, 1868, 15 Stat. 673, Article I). The lack of substance of this argument illustrates the lack of legal support for respondents' position that a money judgment may be awarded against the Tribes themselves.

The "bad men" argument is incorrect for at least the following reasons: [1]

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[1] In addition, the argument was not made below and is thus improper to raise in the Supreme Court for the first time.

1. The "bad men" clause refers to the duty of the Tribes to turn over Indians for criminal prosecution—"*bad men among the Indians* * * * to be *tried and punished.*" Article I (emphasis added). It is thus inapplicable in this civil case.

2. The individual Indians who blocked the road—the "bad men", if respondents' case had merit—were all defendants in this action. Thus, even if this article were applicable, the Tribes fulfilled their duty to "deliver up the wrong-doer to the United States, to be tried and punished according to the laws." The individual Indians simply were held not liable.

3. Finally, if the article were applicable and the Tribes had failed in their duty to make the individual wrong-doers available for trial, the exclusive remedy under the Treaty would be an administrative proceeding before the Commissioner of Indian Affairs.

Article I of the treaty with the Shoshone is no waiver of the Tribes' immunity from suit. The petition should be granted and the decision below reversed.

Respectfully submitted,

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